

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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FIBER TECHNOLOGIES  
NETWORKS, LLC  
Complainant

v.

SHREWSBURY'S ELECTRIC  
LIGHT PLANT  
Respondent

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D.T.E. 01-70

RESPONSE OF METROMEDIA FIBER NETWORK  
SERVICES, INC. TO OPPOSITION OF SHREWSBURY'S  
ELECTRIC LIGHT PLANT TO ITS PETITION TO  
INTERVENE

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I. INTRODUCTION

Pursuant to leave granted by the Commonwealth of Massachusetts Department of Telecommunications and Energy ("Department") Hearing Officer at the October 18, 2001 pre-hearing conference in the above-referenced matter, Metromedia Fiber Network Services, Inc. ("MFN") hereby files this Response to the October 22, 2001 Opposition of Shrewsbury's Electric Light Plant ("SELP") to MFN's October 16, 2001 Petition to Intervene ("Petition").<sup>1</sup>

II. ARGUMENT

A. The Hearing Officer Should Allow MFN's Petition to Intervene

MFN's Petition for Intervention should be granted as it meets the well settled standards for intervention established under the Massachusetts Administrative Procedure Act, G.L.c.30A, §10, and by the Department in 220 C.M.R. 1.03 Under 220 C.M.R. 1.03(b), a petitioner must "describe the manner in which the petitioner is substantially and specifically affected by the proceeding."

MFN urges the Department to exercise its broad discretion and grant MFN's Petition to intervene. The Department has "broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings." *Boston Edison Company*, D.T.E. 97-95 (Interlocutory Order dated March 8, 1999) at 4. *Attorney General v. Department of Public Utilities*, 390 Mass. 208, 216 (1983). In applying its intervention standard, the Department may consider factors such as the interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by another party, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help elucidate the issues of the proceeding. *Boston Edison Company*, D.T.E. 98-118, 99-119/126, at 9 (1999).

B. SELP's Opposition To MFN's Petition Lacks Merit

\_\_\_\_\_The Hearing Officer should find SELP's opposition to MFN's Petition without merit and rule that MFN has satisfied the Department's standards for intervention and that its interests in developing a complete record in interpreting and applying relevant statutes would be served by granting MFN's intervention. SELP's grounds for Opposition are factually and/or legally incorrect. In its Opposition,

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<sup>1</sup> MFN's Petition to Intervene was timely filed in accordance with the Notice of Filing and Public Hearing in this matter.

SELP contends that MFN should be denied intervention because: (1) MFN has not requested or been denied pole attachment licenses from SELP; (2) MFN has not explained how the Department's rulings in this case might specifically have an adverse impact on MFN; (3) SELP (3) MFN's interests are adequately represented by Fibertech; (4) MFN has no information that will elucidate issues in this proceeding and will serve as merely a "cheerleader" for the dark fiber industry; (5) MFN will introduce evidence on public policy and issues that are irrelevant to the instant dispute; and (6) the Department should handle the issue raised by MFN (and Fibertech) in a generic proceeding. While MFN is not currently engaged in a pole attachment dispute with SELP based upon SELP's refusal to permit MFN to attach to its facilities, MFN is nonetheless substantially and specifically affected by this proceeding. In its Petition and during oral argument in support of the taking of testimony in this matter, MFN explained the potentially critical impact of the Department's decision on MFN based on the legal issues raised in SELP's Response to Fibertech's Complaint. SELP has argued that a provider of dark fiber which has filed a Statement of Business Operations and an intrastate tariff with the Department is not entitled to (1) apply for a license to attach to a utility's poles or conduit, pursuant to G.L.c. 166, §25A, or even (2) apply to municipal boards of selectmen or city councils for grants of location to use the public ways pursuant to G.L.c.166, §§21, 22.

The resolution of the issues raised by SELP in this matter could have a significant and substantial effect upon MFN's continuing ability to provide telecommunications services in Massachusetts. Since MFN utilizes the conduit of utilities, such as Verizon, pursuant to conduit occupancy agreements subject to the Department's jurisdiction, it also would be specifically and substantially affected by the Department's rulings on the issues raised by SELP in its Response to the Complaint of Fibertech involving the interpretation and application of G.L.c.166, §25A and 220 C.M.R. 45.00, *et seq.* The

rulings requested by SELP would, if granted, constitute a major policy reversal by the Department and could potentially result in the interruption of services to end users and other carriers served by competitive carriers providing service by placing facilities on existing utility poles. MFN has been part of a robust competitive market offering a variety of telecommunications services to Massachusetts' consumers and enterprises. The positive regulatory climate in Massachusetts has encouraged the placing of facilities and the offering of services in a cost effective manner by encouraging the use of existing incumbent utility facilities. A retrenchment by the Department could have an adverse effect on the continued development of a competitive communications market in Massachusetts. MFN is exposed to legal and economic risks even if this case does not result in an adjudication of its rights under existing a prospective or existing attachment agreement. MFN could be exposed to utility revocation of its pole attachment rights if the Department rules that a provider of dark fiber services that is registered with the Department and has an effective intrastate tariff is not entitled to attach to utility poles.

Furthermore, in a similar case, the Department allowed wireless communications providers not directly parties in a municipal zoning exemption dispute to intervene in order to address the legal issues that could have a significant impact upon their ability to provide services in Massachusetts. In *Dispatch Communications of New England d/b/a Nextel Communications, Inc.*, D.P.U./D.T.E. 95-59- B et al, ("*Nextel* case") the Department allowed three Commercial Mobile Radio Service ("CMRS") providers, Cellular One, AT&T Wireless and Sprint PCS, to intervene in a dispute between Nextel and Sterling, Massachusetts. In the Nextel case, the intervenors enhanced the proceeding record by submitting direct testimony in support of their position that they constituted "public service corporations" under G.L.c.40A, §3 This additional testimony afforded the Department additional information to evaluate a crucial public policy question and enhanced the testimony provided by Nextel. Similar to the

*Nextel* case, MFN's addition to the case at bar will afford the Department additional testimony upon which to fashion crucial public policy in light of the substantial and significant impact of the Department's policy determination on the legal issue of who may constitute a "licensee" under G.L.c.166, §25A.

The addition of MFN as a party will enhance the Department's record and insure that MFN's substantial interests are protected. While MFN shares some of the characteristics of Fibertech, as alleged by SELP, the pleadings do not establish that the interests of MFN and Fibertech are identical. For example, the details of Fibertech's tariffs are not known to MFN and have not been presented. Nor has MFN had an opportunity to review the Statement of Business Operations filed by Fibertech in comparison to its own. Moreover, as explained below, MFN needs to be granted intervenor status in order to present to the Department evidence that Fibertech cannot present.<sup>2</sup>MFN has asked for intervenor status in order to present evidence to the Department that has a bearing upon the proper interpretation of G.L.c.166, §§21, 22 and 25A. It is not merely a "cheerleader" for the dark fiber industry, as SELP charges. MFN is in a position to provide the Department with specific evidence that bears upon the proper application of the provisions of G.L.c.166, §§21, 22 and 25A. During its permitting of its fiber and conduit facilities in another community in 1999, MFN received from the Department correspondence that (1) confirmed that providers of dark fiber are subject to regulation by the Department and (2) supported their entitlement to file for and obtain grants of location and, by implication, their right to attach to utility-owned poles and conduits. MFN alone can present this and other evidence to assist the Department in its interpretation and application of the statutes involved in

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<sup>2</sup> Again, where the Department allowed CMRS providers to intervene in the reopened *Dispatch Communications* matter, there is no basis for precluding MFN from intervening in the present case.

this matter, G.L.c. 166, §25A and G.L.c. 166, §§21, 22. MFN's execution of attachment agreements with other utilities in Massachusetts, as well as an interconnection agreement with Verizon approved by the Department, also constitute evidence that may have a bearing upon the Department's rulings on the legal grounds that SELP has presented for its refusal to entertain Fibertech's request to attach fiber to SELP-owned poles. MFN should be afforded an opportunity to provide the Department with such evidence.

Contrary to SELP's argument, MFN does not intend to “introduce issues that are irrelevant to the instant dispute...[,]pursue evidentiary hearings on matters that are undoubtedly pure public policy...[or] submit testimony on irrelevant facts....” (SELP Opposition at 6). MFN's sole reason for intervention is to provide the Department with evidence that should have a bearing on the legal issues raised by SELP as reasons for denying pole attachment rights to a dark fiber provider that has filed a Statement of Business Operations and an intrastate tariff with the Department. MFN's only legal issues are the ones raised by SELP in its Response; namely, that a provider of dark fiber is entitled to be treated as a “licensee” and entitled to apply for grants of location under G.L.c.166, §§21, 22 and 25A. Furthermore, the fact that a dispute regarding statutory interpretation has been brought to the Department to resolve suggests that it would be beneficial for the Department to take evidence on the public policy issues associated with the interpretation and application of a remedial statute such as G.L.c.166, §25A. In comparison, the present case should involve fewer issues than the pole attachment complaint proceedings that the Department has recently resolved. *See, e.g., Boston Edison Company*, D.T.E. 97-82 (1998). *Massachusetts Electric Company*, D.T.E. 98-52 (1998).

At this preliminary juncture, without seeing SELP's testimony, MFN does not intend to conduct any extensive discovery upon SELP. It might request SELP to provide copies of its attachment

agreements with other parties.<sup>3</sup> MFN has no intention of conducting any discovery with respect to the specific interactions between SELP and Fibertech. Therefore, its participation in this proceeding as an intervenor will not encumber the discovery process or cause that process to be prejudicial to SELP. As stated at the pre-hearing conference, MFN intends to rely primarily upon its direct case to support its position on the legal issues of the application of the pole attachment statute to carriers that provide telecommunications services such as dark fiber and high capacity transmission services. MFN's testimony will center upon bringing to the Department evidence that will inform its judgment in ruling on the legal issues in this matter raised by SELP's own Response. MFN's intervention will not result in the raising of any extraneous legal issues.

In regard to SELP's contention that MFN's participation as an intervenor would convert this complaint docket into a generic proceeding, SELP is incorrect. The legal issues raised in this complaint docket are readily capable of resolution within the 6 month decision-making period available to the Department. The presence of an additional party does not defeat the ability of the Department to resolve this matter within that 6-month period. *Massachusetts Electric Company*, D.T.E. 98-52 (1998)(Attorney General's intervention and active participation did not delay proceeding or cause the Department to address the issues in a generic proceeding). Given the prejudicial impact upon Fibertech of the delay that a generic proceeding would create, the Department should not take that route in order to address the issues raised in its Complaint and SELP's Response. Since MFN is not raising any additional issues beyond those that the Complainant and Respondent have raised, its participation as an

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<sup>3</sup> As an initial matter, if these documents are voluminous, MFN is willing to inspect them at SELP's offices or at its counsel's offices. Of necessity, MFN must reserve the right to conduct discovery after receiving SELP's testimony. However, as stated above, MFN is principally interested in providing the Department with direct evidence that has a bearing upon its interpretation and application of G.L.c. 166, §25A and related, interdependent statutes.

intervenor will not prejudice either party. As noted above, the reopened *Dispatch Communications* case was resolved within six months. It included three days of evidentiary hearings involving 5 witnesses and 160 exhibits. D.P.U./D.T.E. 95-59-B et als (January 8, 1997) at 1-3. The present case can be resolved within 6 months under the hearing schedule proposed by Fibertech.

### Conclusion

MFN's Petition for intervention has met the Department's standards for the granting of the Petition. MFN is prepared to present the Department with evidence, including evidence of the Department's own past practices, concerning companies such as MFN which have filed a Statement of Business Operations and intrastate tariffs with the Department and provided dark fiber to customers (including end users) as part of their early market entry activity. Fibertech is not in a position to represent the interests of MFN or to provide the Department with the type of evidence that MFN alone can provide to assist this investigation. The addition of MFN as a party intervenor will afford the Department a more robust record in ruling on public policy and legal issues that are of critical importance not just to Fibertech, SELP, and MFN, but to the competitive marketplace for communications services in Massachusetts. MFN has, in numerous instances, obtained the type of attachment rights that Fibertech has been denied by SELP.

MFN respectfully requests that the Department grant MFN's Petition in its entirety, and any other further relief the Department deems necessary and proper.



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Respectfully submitted,

METROMEDIA FIBER NETWORK  
SERVICES, INC.

By its attorneys,

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